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No. 89-927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL
Senior Judge of the United States District Court for the Northern District of Illinois, Eastern Division
FOLDING CARTON ANTITRUST LITIGATION, MDL-250

MOTION OF LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND THE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF HUBERT L. WILL

FRANK J. MCGARR
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Chicago, Illinois 60606
(312) 621-0700

Counsel for Movant
Loyola University of Chicago
School of Law

Member of the Bar
of the Supreme Court
of the United States

December 11, 1989

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MOTION OF LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Loyola University of Chicago School of Law ("Loyola University") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Mandamus, or, in the alternative, a Writ of Certiorari, filed in this Court on or about December 8, 1989 by the Honorable Hubert L. Will. The consent of the attorney for the petitioner has been obtained. The respondent judges, The Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, have not consented.

Petitioner, The Honorable Hubert L. Will, presided over the multidistrict class action proceedings known as *In re Folding Carton Antitrust Litigation*, MDL-250. The interest of Loyola University in this case arises from the

fact that Loyola University was the recipient of a significant grant to fund its proposal relating to research in the area of class actions and antitrust law, pursuant to the March 28, 1985 stipulated settlement among the parties to the *Folding Carton* action. On September 11, 1989, the respondent judges declared that the grant made to Loyola University pursuant to the settlement agreement was void. *In re Folding Carton Antitrust Litigation*, No. 88-2438.

The Honorable Hubert L. Will has requested that this Court issue a writ of mandamus or prohibition to the respondent judges to prohibit them from enforcing that portion of their September 11, 1989 order which purports to vacate in part the district court's approval of the parties' settlement of the *Folding Carton* class action. In the alternative, The Honorable Hubert L. Will has requested that this Court issue a writ of certiorari to review the September 11, 1989 order, and that the Court reverse that portion of the order that vacates in part the district court's approval of the parties' settlement.

Loyola University believes that a more detailed explanation of its grant application and award is necessary to a complete record in this case, and for that reason seeks leave to file the attached brief, as *amicus curiae*, in the above-entitled case.

Respectfully submitted,

FRANK J. MCGARR
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Chicago, Illinois 60606
(312) 621-0700

December 11, 1989

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BRIEF OF LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF HUBERT L. WILL

Loyola University of Chicago School of Law ("Loyola University") respectfully submits the following brief as *amicus curiae* in support of the Petition For A Writ Of Mandamus Or Prohibition To The Honorable Harlington Wood, Jr., Richard D. Cudahy And Michael S. Kanne, Judges Of The United States Court Of Appeals For The Seventh Circuit, Or, In The Alternative, Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit, which was filed in this Court on or about December 8, 1989 by The Honorable Hubert L. Will.

STATEMENT OF THE CASE

The brief of The Honorable Hubert L. Will, filed on or about December 8, 1989, fully sets forth the background and facts of this litigation. It is the belief of Loyola University that repetition of the matters thus fully treated, would be contrary to the rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

Pursuant to the March 28, 1985 stipulated settlement among the parties to the multidistrict class action proceedings known as *In re Folding Carton Antitrust Litigation*, MDL-250, Loyola University received a significant grant to fund its proposal relating to research in the area of class actions and antitrust law. The September 11, 1989 order of the respondent judges, The Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, declared that the grant was void. *In re Folding Carton Antitrust Litigation*, No. 88-2438.

The Honorable Hubert L. Will, who presided over the *Folding Carton* action, has petitioned this Court for a writ of mandamus or prohibition to the respondent judges to prohibit them from enforcing that portion of their September 11, 1989 order which purports to vacate in part the district court's approval of the parties settlement of the *Folding Carton* class action. In the alternative, The Honorable Hubert L. Will has requested that this Court issue a writ of certiorari to review the September 11, 1989 order, and that the Court reverse that portion of the

order that vacates in part the district court's approval of the parties' settlement.

If the respondent judges are prohibited from enforcing the portion of the September 11, 1989 order at issue, or if that portion of the order is vacated, Loyola University will utilize the grant as envisioned by the stipulated settlement among the parties to the *Folding Carton* action. Thus, Loyola University will be directly and vitally affected by the outcome of the foregoing petitions.

ARGUMENT

As *amicus curiae*, Loyola University maintains that the distribution of the residue of the *Folding Carton* settlement fund, in accordance with the stipulated settlement reached by the parties, was an appropriate application of the *cy pres* doctrine and a good and proper exercise of the discretion of the United States District Court for the Northern District of Illinois.

I. THE PROPOSAL OF LOYOLA UNIVERSITY IS AN APPROPRIATE APPLICATION OF THE *CY PRES* DOCTRINE AND MIRRORS THE INTENT OF THE RESERVE FUND.

Three years after the settlement of the *Folding Carton* litigation, and following the payment of all known claims and expenses, approximately $6 million remained in a reserve fund established, for the most part, to pay the members of the plaintiff class who had yet to file claims. It was apparent that the remaining reserve funds would not be fully utilized for the intended purpose of enforcing antitrust laws and benefitting absent class members.

See In re Folding Carton Antitrust Litigation, 557 F. Supp. 1091, 1110 (N.D. Ill. 1983), *aff'd in part and rev'd in part*, 744 F.2d 1252 (7th Cir. 1984). After receiving recommendations from all parties and the *Folding Carton* Administration Committee, the district court determined that the remaining funds should first be used to pay late claimants, and that any funds still remaining should be used to establish a foundation for research in the area of complex class actions and antitrust litigation. *Id.*

On March 28, 1985, the parties to the *Folding Carton* litigation reached a stipulated settlement. The settlement provided that the residue which remained in the *Folding Carton* settlement fund be distributed in part to the late claimants, in part to previously paid claimants, and in part to two or more Chicago law schools to fund research projects in the area of class actions and antitrust law, and/or to provide scholarship assistance to needy students. As a condition of the stipulated settlement, all pending petitions in the Supreme Court were dismissed by the various parties.

After the initial grant to Loyola University was approved, the court of appeals found that the *cy pres* doctrine was appropriately utilized to determine the manner in which the remaining reserve funds should be distributed. *In re Folding Carton Antitrust Litigation*, No. 88-2438. However, the court of appeals disapproved of the charitable purpose selected by all the parties; namely, the grants to the law schools. *Id.* As demonstrated more fully below, the Center proposed by Loyola University pursuant to the stipulated settlement is an appropriate application of the *cy pres* doctrine. *See Noel v. Olds*, 138 F.2d 581, 587 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 773 (1944) The Center mirrors the intention and spirit of the resolution of the *Folding Carton* litigation by its commitment to the research and development of the law relating to

antitrust issues and class actions, and by the indirect benefit it would provide to the unidentified class members and other members of the public who are presently or prospectively similarly situated. Thus, the grant to Loyola University is the "next best" use of the remaining reserve funds. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 641 F. Supp. 259, 265 (C.D. Ariz. 1986) ("When the entire damage fund is not claimed by class members, the fund is put to its 'next best' use which furthers the original purpose of compensation of individual victims.").

A. Loyola University Expended A Substantial Amount Of Time And Energy In Connection With Its Grant Application And Subsequent Award.

Following the approval of the stipulated settlement among the parties, notification of the available funds was given to all six Chicago law schools, each of which submitted applications for grants. In addition to a grant to the University of Chicago, Loyola University was the recipient of a grant to fund its proposal to establish a Center for Antitrust Law in the Public Interest (the "Center"). The proposed Center would study the workings of our private enterprise economy and the role, if any, which antitrust law should play in maximizing competition in the public interest. In addition, the Center would strive to become a national resource in the field of antitrust law.

Upon notification of the grant, Loyola University entered into a declaration of acceptance and agreement on the 16th day of January, 1987, an agreement extensively negotiated between the University and counsel of record charged with the administration of the fund.[1] This agree-

[1] The Declaration of Acceptance and the Operating Budget for the proposed Center are reproduced in the attached Appendix as Exhibit A.

ment recognizes the acceptance of the proposal of Loyola University and commits the University to considerable matching expense in the establishment and implementation of the Center as a permanent part of the University's School of Law.

The Dean of Loyola University School of Law, Nina Appel, worked closely with faculty members, outside consultants and university administrators in preparation for the incorporation of the Center into the law school, and within the University. The effect of the commitment of the University to the establishment of support of the Center is to match the $1.2 million benefit from the reserve fund with an equal fiscal commitment from the University, thus greatly magnifying and extending the scope of the benefits made possible by the original grant.

The extensive commitment of time, talent and funds by Loyola University to the establishment of the Center, and its commitment to the Center's continuing support, is an eloquent statement of the confidence of the University that this project will have far-reaching beneficial consequences to the judicial, legal, business and academic communities and ultimately to the country as a whole. By choosing the Loyola University proposal, the *Folding Carton* Administration Committee has endorsed this belief, as has the district court.

The Center for Antitrust Law in the Public Interest, proposed by Loyola University and approved by the United States District Court for the Northern District of Illinois, is designed as a national resource. In addition it fits directly within the University's mission. It will benefit by being part of the University, and drawing upon existing inter-disciplinary strengths within the ten schools and colleges, the institutes and 73 academic departments of

the University. Even more than an independent foundation, a university-based center is able to conserve and utilize its resources in a manner consistent with the public good.

B. The Proposed Center For Antitrust Law In The Public Interest Satisfies The General Intent Of The Reserve Fund.

Consistent with the general intent of the reserve fund, the Center, as proposed by Loyola University, reflects a commitment to the understanding and development of antitrust policies. In addition, the Center would indirectly benefit the unidentified class members in this case and other members of the public who are presently or prospectively similarly situated. The Center is intended to be unique: an academic-based center for the *national* dissemination of information regarding the impact of antitrust policy on consumers, and others under-represented in current antitrust policy. The focus of the Center is to monitor cases, and to subject the decisions of courts and agencies to an economic scrutiny comparable to the legal analysis they routinely receive. Serving as a national depository of research—published and not—the Center would strive to share information with the public, through an annual report, teaching, conferences and other activities.[2]

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[2] It should be noted that the Center envisions a program more focused on information than research and different from the "Antitrust Development and Research Foundation" rejected in *Folding Carton I. See In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984), *cert. dismissed sub nom. G. Heileman Brewing Co. v. Folding Carton Administration Comm.*, 471 U.S. 1113 (1985). In addition, unlike a newly created foundation, the University currently possesses the administrative capabilities necessary to operate the proposed Center.

CONCLUSION

It is the hope of Loyola University and the Loyola University School of Law that the acceptance of the foregoing *Amicus* Brief, commenting upon this aspect of the case, will assist the Court in its consideration of this matter.

Respectfully submitted,

FRANK J. MCGARR
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Chicago, Illinois 60606
(312) 621-0700

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APPENDIX TO THE BRIEF OF LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW AS *AMICUS CURIAE*

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Exhibit A

DECLARATION
OF
ACCEPTANCE AND AGREEMENT

WHEREAS, the Folding Carton Antitrust Litigation in the United States District Court, Northern District of Illinois, Eastern Division, Master File No. MDL 250, has been concluded and there remains available for distribution a reserve fund consequent of said litigation; and

WHEREAS, the District Court in pertinent part ordered that:

> "[The balance of the Fund] . . . shall be distributed as promptly as possible, to two or more existing Chicago area law schools, . . . for the purpose of furthering research projects involving analysis and enforcement of the antitrust laws . . . ."; and

WHEREAS, the District Court appointed the Folding Carton Administration Committee to review proposals for the utilization of funds in accordance with the Court's Order and to make recommendations to the Court in that regard; and

WHEREAS, the School of Law of Loyola University of Chicago has submitted a proposal which the Administration Committee has favorably recommended to the Court; and

WHEREAS, the District Court has determined to accept said recommendation and to order the distribution of funds in accordance therewith; and

WHEREAS, Loyola University desires to declare its acceptance of said funds and to evidence its agreement to comply with the terms and conditions regarding the use thereof;

NOW, THEREFORE, Loyola University of Chicago hereby declares its acceptance and agreement as follows:

DECLARATION

Loyola University of Chicago, an Illinois not-for-profit Corporation ("Loyola") hereby agrees to accept out of the reserve fund of the Folding Carton Antitrust Litigation, MDL 250, the sum of One Million Two Hundred Thousand Dollars ($1,200,000) as an endowed fund from the United States District Court for the Northern District of Illinois, Eastern Division ("District Court"), to be used in accordance with the order of the District Court dated January ____, 1987, which order is attached hereto and incorporated herein by reference, for the purposes and in the manner hereinafter set forth.

PURPOSE

The purpose of the distribution and this Declaration of Acceptance and Agreement is to establish The Center for Antitrust Law in the Public Interest (the "Center") as a permanent part of the Loyola School of Law. The Center will have as its major goal the promotion of the free enterprise system in the public interest and the development of research and other materials aimed at supporting this goal.

In order to carry out this goal, the Center will monitor research, economic and legal, on a continuing basis, serve as a depository and clearinghouse for significant studies in antitrust law and related fields, sponsor meetings for members of interested groups and constituencies involved in antitrust issues who are otherwise under-represented in the public debate and promote public education, in order to insure public understanding and awareness in this area.

The objectives of the Center and its projected activities are set forth in greater specificity in a document entitled

"A Proposal from Loyola University of Chicago School of Law to The Folding Carton Administration Committee" dated November 17, 1986 (the "Proposal"), particularly pages one through eleven, and this Declaration of Acceptance and Agreement incorporates said pages of the Proposal by reference.

STRUCTURE AND SUPPORT

In return for the endowed funds presently being ordered transferred to Loyola by the District Court, Loyola agrees to provide staffing and support for the Center consistent, at a minimum, with an annual direct cost budget for each Loyola fiscal year commencing on and after July 1, 1987 of One Hundred Ninety-Four Thousand Eight Hundred Twelve Dollars ($194,812.00). The budget for the first such Fiscal Year is attached hereto as Appendix "A." Any income generated by the Fund and not expended prior to the initial Fiscal Year will be used exclusively for the purpose of the Center.

Such budget will, at the outset, include:

A. One full-time Executive Director who shall be a full-time employee of the Center with faculty status, recruited and selected through normal academic procedures, who shall be trained in the disciplines of economics and/or law;

B. One Associate Director who will be a regular member of the full-time faculty and who will dedicate one-third time to the Center;

C. One librarian who will dedicate one-third time to the Center:

D. One Computer Analyst who will dedicate one-fifth time to the Center; and

E. One full-time secretary.

F. All reasonable costs of the Center including those for printing, travel, equipment, library, mailing, copying and other miscellaneous expenses.

The Center will be housed in the Loyola Law School. Loyola will absorb all indirect costs which are attributable to this budget.

RESEARCH PROJECTS

Loyola Law School agrees to provide a total of $150,000 to fund Loyola Faculty Research projects which are consistent with the goals of the Center.

ADVISORY BOARD

The Center shall have an Advisory Board consisting of seven members. The Dean of the Law School shall be an ex officio member of the Advisory Board and shall serve as chairman with full voting privileges. The other six initial members of the Advisory Board shall be Professor Jane Locke, Perry Goldberg, James Sloan, Alexander Domanskis, Thomas Boodell, and John McHugh. The six members will serve staggered three year terms, the initial terms of one, two and three years to be determined by lot at the initial meeting. The initial board members may be reelected by action of the Advisory Board. Successors to the initial members shall be nominated by the Advisory Board and appointed by the President of Loyola. The members of the Advisory Board shall receive no compensation for their services as Advisory Board Members.

DUTIES OF THE ADVISORY BOARD

The Advisory Board shall have oversight responsibilities with respect to the budget of the Center and shall assure that Loyola faithfully honors its commitments as set forth in this Declaration of Acceptance and Agreement and the accompanying order. On recommendation of the Dean, the Advisory Board may approve specific amendments to this Declaration of Acceptance and Agreement which are consistent with its general purposes, but no such amendment shall reduce the financial commitment undertaken hereunder by Loyola and its School of Law. The Advisory Board shall approve the Executive Director.

GENERAL

The Center shall at all times be operated in connection with the Law School of Loyola for purposes and in a manner which is consonant with the status of Loyola as an organization described in Sections 501(c)(3) and 170(b)(1)(A) and (c) of the Internal Revenue Code and its status as an Illinois not-for-profit corporation. The fund created pursuant to this Declaration of Acceptance and Agreement shall be managed and administered as an endowed fund in accordance with the "Uniform Management of Institutional Funds Act," as adopted in the State of Illinois. For purposes of this agreement, the funds distributed to Loyola by the District Court shall be subject to reversion to the District Court for other charitable purposes if they are not used in accordance with the Order of the District Court.

Loyola understakes to use its best efforts to secure all necessary funding for the research of the Center and to foster the growth of the Center.

APPROVAL

This Declaration of Acceptance and Agreement is subject to the approval of the Board of Trustees of Loyola University of Chicago. The undersigned officers and Dean will recommend such approval at the next scheduled meeting of the Board of Trustees on March 13, 1987, and it is anticipated that approval will be given. If for any reason such approval is not given on said date, the funds previously distributed to Loyola hereunder shall be returned by it within five (5) days and this Declaration of Acceptance and Agreement shall have no further force or effect.

IN WITNESS WHEREOF, Loyola University of Chicago has caused this Declaration of Acceptance and Agreement to be executed by its duly authorized officers and Dean of its School of Law on this 16th day of January, 1987.

/s/ NINA S. APPEL
Nina S. Appel
Dean
Loyola University School of Law

/s/ R. C. BAUMHART, S.J.
R. C. Baumhart, S.J.
President

ATTEST:

/s/ WILLIAM H. OSWALD
William H. Oswald
Secretary

/s/ RONALD E. WALKER
Dr. Ronald E. Walker
Senior Vice President and Dean of Faculties

United States District Court
Northern District of Illinois, Eastern Division

In re:	)
	)
Folding Carton	)
	) Master File No. MDL 250
Antitrust Litigation	)
	) The Honorable
	) Hubert L. Will
	)

ORDER

The Court being fully advised in the premises:

IT IS HEREBY ORDERED, that LaSalle National Bank forthwith pay the sum of One Million and Two Hundred Thousand Dollars ($1,200,000) to Loyola University of Chicago ("Loyola") pursuant to the terms of the Declaration of Acceptance and Agreement attached hereto as Exhibit A.

IT IS FURTHER ORDERED that the funds hereby given to Loyola shall be used solely as set forth in Exhibit A and shall be subject to reversion to the United States District Court for other charitable purposes if they are not so used.

ENTER: _____
U.S. District Court Judge

Center for Antitrust Law in the Public Interest

Operating Budget

July 1, 1987 to June 30, 1988

		Total
Personnel	Exec. Dir. (100% 12 mos.)	$ 70,000
	Assoc. Dir. (1/3 time)	17,000
	Librarian (1/3 time)	8,500
	Computer analyst (1/5 time)	6,000
	Secretary (100% 12 mos.)	18,000
	Total salaries & wages	119,500
	Fringes @ .157	18,762
	Total Personnel	138,262
Other Costs	Printing	15,000
	Supplies	3,000
	Mailings	5,700
	Photocopying	3,600
	Telephone	4,900
	Travel	3,000
	Equipment	10,000
	Library	10,000
	Computer	1,350
	Total other costs	56,550
Direct Costs		$194,812

Appendix "A"